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No. 05-1575

In The Supreme Court of the United States

DORA B. SCHRIRO, *et al.*,

Petitioners,

v.

JEFFREY TIMOTHY LANDRIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

Established Ethical Rules, Practice Guidelines, Common Law Principles, and Constitutional Jurisprudence Provide the Prevailing Professional Norms Under Which the Reasonableness of Counsel's Performance Should Be Judged 5

A. Presently Prevailing Professional Norms, As Well As Those Prevailing Professional Norms at the Time of Landrigan's Sentencing, Require Lawyers to Conduct a Reasonable Investigation and Inform the Client Regarding Client Decisions 6

1. Prevailing Professional Norms Require a Lawyer to Investigate 7

2. Prevailing Professional Norms Require a Lawyer to Inform and Advise the Client Regarding Client Decisions 10

B. The Fiduciary Obligations of Lawyers Reflected in Contemporary Professional Norms Derive from a Deeply-Rooted Common Law Tradition 12

C. Because These Ethical Questions Cannot Be Answered on the Present Record, Remand is Required 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Baird v. Pace,
752 P.2d 507 (Ariz. 1987) 6

Baker v. Humphrey,
101 U.S. 494 (1879) 11

In re Cardenas,
791 P.2d 1032 (Ariz. 1990) 6

Cox v. Sullivan,
7 Ga. 144 (1849) 13

In re Curtis,
908 P.2d 472 (Ariz. 1995) 6

Fitch v. Scott,
3 How. (Miss.) 314 (1839) 13

Gilbert v. Williams,
8 Mass. 51 (1811) 13

Goodman v. Walker,
30 Ala. 482 (1857) 13

Marshall v. Hendricks,
307 F.3d 36 (3d Cir. 2002) 5

People v. Mattson,
336 P.2d 937 (Cal. 1959) 11

Rescue Army v. Municipal Court,
331 U.S. 549 (1947) 9

State v. Carriger,
645 P.2d 816 (Ariz. 1982) 8

State v. Fisher,
730 P.2d 825 (Ariz. 1986) 6, 7

State v. Lopez,
412 P.2d 882 (Ariz. App. 1966) 7

State v. Schultz,
681 P.2d 374 (Ariz. 1984) 7, 8

Stevens v. Dexter,
55 Ill. 151 (1870) 13

Strickland v. Washington,
466 U.S. 668 (1984) 3, 4

Tollett v. Henderson,
411 U.S. 258 (1973) 3

Vallinoto v. DiSandro,
688 A.2d 830 (R.I. 1997) 12

In re Wolfram,
847 P.2d 94 (Ariz. 1993) 6

Wood v. McGrath, North, Mullin & Kratz,
589 N.W. 2d 103 (Neb. 1999) 11

RULES

Sup. Ct. R. 37.6 1

ARIZONA RULE OF PROF'L CONDUCT 1.1 (1990) 6, 7

ARIZONA RULE OF PROF'L CONDUCT 1.1 cmt.
(1990) 8

ARIZONA RULE OF PROF'L CONDUCT 1.3 (1990) 6, 7

ARIZONA RULE OF PROF'L CONDUCT 1.3 cmt.
(1990) 8

ARIZONA RULE OF PROF'L CONDUCT 1.4 (1990) 6, 10

ARIZONA RULE OF PROF'L CONDUCT 1.4 cmt.
(1990) 10

ARIZONA RULE OF PROF'L CONDUCT 2.1 (1990) 10

AMERICAN BAR ASSOCIATION MATERIALS

ABA MODEL RULE OF PROF'L CONDUCT 1.1 ..... 4, 7

ABA MODEL RULE OF PROF'L CONDUCT 1.1 cmt. 5
(1990) 8

ABA MODEL RULE OF PROF'L CONDUCT 1.2 4

ABA MODEL RULE OF PROF'L CONDUCT 1.3 7

ABA MODEL RULE OF PROF'L CONDUCT 1.3 cmt. 1 8

ABA MODEL RULE OF PROF'L CONDUCT 1.4 10

ABA MODEL RULE OF PROF'L CONDUCT 1.4(b) 4

ABA MODEL RULE OF PROF'L CONDUCT 1.4 cmt. 10

ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1980) 8-9

ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 cmt. (2d ed. 1980) 9

ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 (3d ed. 1993) 4, 9

ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 cmt. (3d ed. 1993) 9

ABA STANDARD FOR CRIMINAL JUSTICE 4-3.8 (3d ed. 1993) 10-11

OTHER AUTHORITIES

Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004) 14

MALLEN & SMITH, 2 LEGAL MALPRACTICE, § 14.1 (2006) 12

FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 1207 (1914) 13

FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 2197 (1914) 13

FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 2188 (1914) 12

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 7

Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998) 14

GEORGE SHARSWOOD, PROFESSIONAL ETHICS 26 (1854) 14

CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (1986) 4, 12

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 413,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

The ABA has a well-established tradition of advocating for the ethical and effective representation of all clients and has drafted, promulgated and interpreted rules of professional conduct for almost a century. In 1908, the ABA adopted the Canons of Professional Ethics and in 1913, the ABA established the Standing Committee on Professional Ethics. In 1969, the ABA adopted the Model Code of Professional Responsibility which was subsequently adopted by the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. In addition, the parties have consented to the filing of *amicus* briefs in this matter.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Counsel has participated in the adoption or endorsement of the position of this brief, nor was it circulated to any member of the Judicial Division Counsel prior to filing.

vast majority of state and federal courts. In 1983, the ABA drafted the Model Rules of Professional Conduct. Today, all but a handful of jurisdictions have adopted a version of the Model Rules. Arizona adopted the ABA Model Rules of Professional Conduct with some amendments on February 1, 1985.

Since August 1908, when the ABA adopted the original Canons of Ethics, an unbroken thread that runs through every iteration of each set of rules has been the lawyers' dedication to the client's cause, competence in every endeavor, diligence in the timely provision of legal services, and communication with the client at every step of the way so that client decisions only follow well informed discussions with their lawyers. As the *amicus* in the present matter, the ABA can provide this Court with a description of the ethical norms the ABA believes this Court should apply to the questions this case presents. Accordingly, the brief of the *amicus* will focus on the lawyer's ethical obligations as defined by the ABA Model Rules of Professional Conduct as adopted by the Supreme Court of Arizona.

SUMMARY OF THE ARGUMENT

A judicial determination about the adequacy of counsel's efforts in defending a capital defendant requires inquiry into whether counsel adequately advised the client of the role and purpose of presenting mitigating evidence, whether counsel sought to locate mitigating evidence, whether counsel unreasonably failed to uncover crucial evidence, and whether counsel made sound judgments in withholding

mitigating evidence. In the instant case, the Court of Appeals reasonably found that the record has not been developed on those issues. The merits of Landrigan's Sixth Amendment claim should not be reached without first developing and analyzing such a complete factual record. Failure to require the parties to develop such a record would cast uncertainty on well-acknowledged standards governing the duty of lawyers to advise their clients knowledgeably only after conducting a sufficient investigation to inform themselves about the essential facts bearing on the client's rights and interests. A decision on the merits must be based on the application of law to established facts regarding the lawyer's investigation and advice so that defense lawyers can be instructed as to what is required to meet their ethical obligations.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a valid ineffective assistance of counsel claim requires the habeas petitioner to show that counsel's performance was deficient and that the deficiency prejudiced the defense.[2] The proper measure of lawyer performance under the first prong of the *Strickland* test is "simply reasonableness under

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[2] It should be noted that the same factual basis that is necessary to make a determination as to the performance prong of *Strickland* is also at least partially necessary to make any determination regarding the waiver issue under the prejudice prong of *Strickland*. Both inquiries require examination of whether counsel informed Landrigan of the nature of mitigation evidence, its importance, the kinds of mitigating evidence potentially applicable to Landrigan's case based upon counsel's reasonable investigation, and the potential consequences of presenting or not presenting such evidence. *See Tollett v. Henderson*, 411 U.S. 258, 268 (1973).

prevailing professional norms." 466 U.S. at 688. These professional norms exist in many forms, including ethical rules of conduct, ABA Standards and common law duties. *See id.* at 688-89.

Several interrelated professional norms of lawyer performance are relevant to the matter presently before the Court. As a fundamental principle, lawyers are agents of their clients and, as such, they should obey their clients and pursue their clients' objectives so long as the clients are competent and the clients' objectives are not illegal or unethical. *See* ABA MODEL RULE OF PROF'L CONDUCT 1.2.; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146, 164 (1986). However, before eliciting and then following their clients' directions, lawyers have a duty to advise and inform their clients to ensure that any client decisions regarding the representation are informed ones. *See* ABA MODEL RULE OF PROF'L CONDUCT 1.4(b). In turn, to provide competent information and advice to clients, lawyers must adequately investigate the matters at issue. *See* ABA MODEL RULE OF PROF'L CONDUCT 1.1; ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1. Simply put, counsel has obligations to provide information and advice based upon adequate investigation and research.

The existence of these obligations gives rise to a series of factual questions that must be addressed in an evidentiary hearing before the merits of Landrigan's constitutional claim can be adjudicated. The present record, however, is silent regarding whether - and to what extent -- counsel informed Landrigan about the purpose of mitigating evidence. It is also undeveloped

with respect to the scope of counsel's investigation into mitigating evidence, the kinds of mitigating evidence that were potentially available in Landrigan's case, and the advantages and disadvantages of presenting that evidence. Accordingly, the Ninth Circuit majority properly determined that a hearing on remand was necessary to develop these critical facts. *See Marshall v. Hendricks*, 307 F.3d 36, 110 (3d Cir. 2002) (". . . under *Strickland* the reviewing court must consider whether counsel's performance was substandard by employing a specific inquiry into what counsel did and why, and comparing that to what the [defendant] urges should have been done; such an inquiry cannot rest on generalized assumptions.").

ARGUMENT

Established Ethical Rules, Practice Guidelines, Common Law Principles, and Constitutional Jurisprudence Provide the Prevailing Professional Norms Under Which the Reasonableness of Counsel's Performance Should Be Judged.

Although the record is currently silent regarding defense counsel's investigation and communication with Landrigan prior to Landrigan's sentencing, the standards to be applied to those undiscovered facts are well-established, fundamental principles governing the attorney-client relationship. Having firmly planted historical roots in the common law governing fiduciary and agency relationships, the applicable professional norms require a lawyer to be competent and diligent. In turn, these broad duties demand that lawyers investigate facts and inform, advise and develop a relationship of trust and confidence with their clients.

A. Presently Prevailing Professional Norms, As Well As Those Prevailing Professional Norms at the Time of Landrigan's Sentencing, Require Lawyers to Conduct a Reasonable Investigation and Inform the Client Regarding Client Decisions.

At the time of Landrigan's sentencing in 1990, the ABA Model Rules of Professional Conduct adopted by the Arizona Supreme Court provided that lawyers had ethical duties to be competent and diligent and to communicate with their clients. *See* ARIZONA RULES OF PROF'L CONDUCT 1.1, 1.3, 1.4 (1990). In interpreting these duties, Arizona courts have repeatedly recognized that lawyers have obligations to investigate facts and inform the client. *See In re Curtis*, 908 P.2d 472, 478 (Ariz. 1995) (finding a violation of the lawyer's duty of competence where counsel "did not attempt a thorough review of the matter"); *In re Wolfram*, 847 P.2d 94, 101 (Ariz. 1993) (finding that defense counsel violated the rule requiring client communication where lawyer failed to keep client informed about the status of the criminal trial and thereby prevented client from participating in important decisions); *In re Cardenas*, 791 P.2d 1032, 1034 (Ariz. 1990) (finding that counsel's failure to identify and explain important matters to client violated lawyer's obligation to communicate with client); *Baird v. Pace*, 752 P.2d 507, 511 (Ariz. 1987) ("Even as to doubtful matters, an attorney is expected to perform sufficient research to enable him to make an informed and intelligent judgment . . . ."); *State v. Fisher*, 730 P.2d 825, 828 (Ariz. 1986) (finding that defense counsel acted incompetently because he failed to "properly investigate or utilize vital evidence and

testimony"); *State v. Schultz*, 681 P.2d 374, 376 (Ariz. 1984) (noting that counsel has a "duty to investigate" and "explore all avenues leading to facts relevant to the merits of the case"); *State v. Lopez*, 412 P.2d 882, 886 (Ariz. App. 1966) ("It is counsel's duty to investigate carefully all defenses of fact and law that may be available to the defendant . . . .").

1. Prevailing Professional Norms Require a Lawyer to Investigate.

In 1990, codifications of the rules governing Arizona lawyers required lawyers to be competent and diligent. *See* ARIZONA RULE OF PROF'L CONDUCT 1.1 (requiring lawyers to provide "competent representation" which demands "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); ARIZONA RULE OF PROF'L CONDUCT 1.3 (1990) (requiring lawyers to act with "reasonable diligence and promptness in representing a client"); *see also* ABA MODEL RULES OF PROF'L CONDUCT 1.1, 1.3. Those same requirements remain in full force today, both in Arizona and in more than 45 jurisdictions that follow the ABA Model Rules on competence and diligence. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (stating that lawyers must "exercise the competence and diligence normally exercised by lawyers in similar circumstances").

In practice, a competent and diligent representation requires adequate preparation and research by the lawyer. *See State v. Fisher*, 730 P.2d 825, 828 (Ariz. 1986) (finding that defense counsel acted

incompetently because he failed to "properly investigate or utilize vital evidence and testimony"); *State v. Schultz*, 681 P.2d 374, 376 (Ariz. 1984) (noting that counsel has a "duty to investigate" and "explore all avenues leading to facts relevant to the merits of the case"); *see also* ABA MODEL RULE OF PROF'L CONDUCT 1.1 cmt 5. The comments to the 1990 version of Arizona's Rule of Professional Conduct 1.1 explain that "adequate preparation" demands "inquiry into and analysis of the factual and legal elements of the problem." ARIZONA RULE OF PROF'L CONDUCT 1.1 cmt. (1990). In addition, the comments explain that adequate preparation in a given matter will vary depending upon what is at stake in the litigation such that matters of significant consequence demand more attention and preparation. *Id.*; *see also* ABA MODEL RULE OF PROF'L CONDUCT 1.3 cmt 1. The 1990 version of Arizona Rule 1.3 describes diligent preparation as allowing counsel to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." ARIZONA RULE OF PROF'L CONDUCT 1.3 cmt. (1990).

If one applies the foregoing principles to a capital case like Landrigan's, the ethically mandated measures that a diligent defense lawyer was required to pursue had to include a reasonable investigation of mitigating circumstances that had the potential to save the client from a death sentence. *See State v. Carriger*, 645 P.2d 816, 819 (Ariz. 1982) (noting that, at a minimum, defense counsel has an obligation to prepare and present "available pertinent mitigating evidence" at the penalty phase); ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1980) ("It is the duty of the lawyer

to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."); ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 cmt. (2d ed. 1980) ("The lawyer has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions.").[3]

Far from being able to adjudicate whether Landrigan's lawyer fulfilled his investigative duties under the particular circumstances of this case (or to assess the consequences of any failure on his part to fulfill those duties), a court handicapped by the present undeveloped record cannot even define those duties with the "concreteness, definiteness, [and] certainty" demanded for responsible constitutional adjudication. *Rescue Army v. Municipal Court*, 331 U.S. 549, 573 (1947). The current record indicates only that Landrigan's counsel apparently subpoenaed two of Landrigan's family members to testify at the penalty phase; the record is bare of any facts regarding whether counsel took any action to investigate the other types of mitigating evidence that Landrigan now claims should have been presented on his behalf and if not, why not. Without these crucial facts, a court cannot make a fully informed decision about the issues central to the merits of Landrigan's Sixth Amendment claim.

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[3] The Third Edition of the ABA Standards of Criminal Justice, which is currently in effect, enumerates the same duty to investigate. *See* ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 (3d ed. 1993); ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 cmt. (3d ed. 1993).

2. Prevailing Professional Norms Require a Lawyer to Inform and Advise the Client Regarding Client Decisions.

At the time of Landrigan's sentencing, the Arizona Supreme Court had adopted Rule 1.4 of the ABA Model Rules of Professional Conduct, which required lawyers to inform and advise their clients. *See* ARIZONA RULE OF PROF'L CONDUCT 1.4 (1990) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); ARIZONA RULE OF PROF'L CONDUCT 1.4 cmt. (1990) ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . ."); ARIZONA RULE OF PROF'L CONDUCT 2.1 (1990) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); *see also* ABA MODEL RULE OF PROF'L CONDUCT 1.4 cmt. ("Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation . . . . The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . ."). Similarly, the ABA Standards for Criminal Justice apply the same requirement in the criminal defense context, providing that "[d]efense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA STANDARD FOR CRIMINAL JUSTICE

4-3.8 (3d ed. 1993). In practice, these basic requirements have been endorsed by courts across the country for more than a century.[4]

Again, the current record in this case is insufficiently developed to determine whether Landrigan's lawyer met these long-recognized duties of consultation and informed advice, or even to specify the precise nature of those duties under the particular circumstances of Landrigan's prosecution. Without knowing the extent of counsel's investigation of potentially mitigating factors, the extent to which he informed Landrigan about the fruits of that investigation and the value of such mitigation evidence, or even the extent to which counsel discussed with Landrigan that counsel planned to subpoena the family members, the court does not have the necessary facts - the adequate record that the remand ordered by the Ninth Circuit would provide - to measure counsel's performance. To rule on the merits of Landrigan's Sixth Amendment claim without a solid factual basis could only serve to inject uncertainty into the standards that the criminal defense bar must rely upon to conform their conduct.

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[4] *See e.g., Baker v. Humphrey*, 101 U.S. 494, 500 (1879) ("It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client receive."); *Wood v. McGrath, North, Mullin & Kratz*, 589 N.W. 2d 103, 114 (Neb. 1999) ("A lawyer should exert his or her best efforts to ensure that the decisions of a client are made only after the client has been informed of relevant considerations."); *People v. Mattson*, 336 P.2d 937, 949 (Cal. 1959) ("The right of an accused to the services of an attorney contemplates that the attorney will investigate possible defenses or alternative procedures and advise the accused of his conclusions . . . .").

B. The Fiduciary Obligations of Lawyers Reflected in Contemporary Professional Norms Derive from a Deeply-Rooted Common Law Tradition.

The fiduciary duties reflected in the foregoing professional norms governing attorney-client relations have historical roots that predate and exist independently of modern rules of professional conduct and practice guidelines. *See* MALLEN & SMITH, 2 LEGAL MALPRACTICE, § 14.1 (2006); *Vallinoto v. DiSandro*, 688 A.2d 830, 845 (R.I. 1997) (noting that the fiduciary obligations of lawyers existed before rules of professional conduct and require lawyers to competently represent their clients' interests and diligently carry out all the obligations owed to them).

The fiduciary duties of lawyers toward their clients derive in part from the common-law of agency. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (1986). In an early 20th century treatise on agency law, Floyd R. Mechem noted that the attorney-client relationship was one of "trust and confidence" and further, that "the rules which govern the conduct of other persons standing in fiduciary relations, apply with special force to the dealings of the attorney with his client." FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 2188 (1914).

In explaining these principles of fiduciary law and their application to the attorney-client relationship, the treatise clearly articulates duties of competence and diligence and references a lawyer's obligation to inform the client and pursue all reasonable and proper

avenues toward obtaining relief for the client. For instance, with respect to counsel's duty to inform and advise the client, Mechem reports that "it is always the duty of an agent . . . to fully inform the principal of all facts relating to the subject-matter of the agency which come to the knowledge of the agent, and which it is material for the principal to know for the protection of his interests." *Id.* § 1207.

Furthermore, with respect to the obligations of diligence and investigation, the common law provided that "it [was] the duty of the attorney, who undertakes the collection or enforcement of a claim, to prosecute that object with reasonable diligence" and that any such attorney must "not permit the claim to be lost through his negligent inattention to his duty." *Id.* § 2197 (citing *Stevens v. Dexter*, 55 Ill. 151 (1870); *Goodman v. Walker*, 30 Ala. 482 (1857); *Cox v. Sullivan*, 7 Ga. 144 (1849); *Fitch v. Scott*, 3 How. (Miss.) 314 (1839); *Gilbert v. Williams*, 8 Mass. 51 (1811)). This undertaking to exercise reasonable diligence required the attorney to "sue out all process, *mesne* as well as final, which may be necessary to effect the object" of the representation." *Id.* § 2197. In other words, for centuries, the common law has recognized the basic obligations of the lawyer to inform, investigate, and carry out his representation with competence and diligence.

Regarding the lawyer's duties of diligence and preparation, George Sharswood explained that a party has a right "to have every view presented to the minds of the judges" who decide their cases, and further, that "the office of the counsel is to assist [clients] by doing that which the client in person, from want of learning,

experience, and address, is unable to do in a proper manner." GEORGE SHARSWOOD, PROFESSIONAL ETHICS 26 (1854). Simply put, counsel had a duty to put his expertise and knowledge to work preparing and investigating "all fair arguments arising on the evidence." *Id.* at 44. Moreover, as to a lawyer's duty to inform and advise the client, Sharswood summarized the obligations of counsel in observing that "[i]t is in some measure the duty of counsel to be the keeper of the conscience of the client; not to suffer him, through the influence of his feelings or his interest, to do or say anything wrong in itself, and of which he would himself afterwards repent." *Id.* at 46. In other words, Sharswood recognized that lawyers have an obligation to use their experience and knowledge not only to investigate the client's cause, but also to inform the client as to the consequences of the client's decisions and advise him or her against short-sighted or uninformed choices.

In sum, the fundamental obligations of lawyers to act diligently and competently are centuries-old concepts that, in practice, require lawyers to investigate, inform and advise their clients.[5] These obligations, which lie at the heart of Landrigan's habeas petition, also have a long tradition of being strictly guarded and enforced by the courts. In light of this historical context, the professional norms dictated

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[5] Indeed, contemporary scholars have traced the fiduciary-type obligations of attorneys back even further to medieval times in England and elsewhere. *See, e.g.*, Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004); Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998).

by more contemporary rules of professional conduct, practice guidelines and case law are best understood as no more than the current reflections of deeply-rooted, traditional and fundamental fiduciary principles.

C. Because These Ethical Questions Cannot Be Answered on the Present Record, Remand is Required.

The duties of competence, diligence, and communication required defense counsel to fulfill several obligations relating to the penalty phase of Landrigan's trial. First, counsel had a duty to conduct a reasonable investigation into potentially mitigating circumstances prior to the sentencing hearing. Second, he had a duty to inform Landrigan about the progress of that investigation and the various kinds of mitigating evidence potentially available to him. Third, before acquiescing in any client decision to forego presentation of any mitigating evidence, counsel had a duty to advise Landrigan about the importance of mitigating evidence and the consequences of presenting or not presenting it.

On the present record, one cannot tell what minimum steps Landrigan's lawyer needed to take in order to satisfy these ethical obligations, still less whether he took them. The entire course of dealings between Landrigan and the lawyer remains obscure and unexamined in the record presented to the Ninth Circuit and this Court. The colloquy reflected in the transcript at Landrigan's sentencing hearing raises important questions, but does not answer them. Under those circumstances, the Ninth Circuit's decision to

remand the case to the District Court for development of an adequate factual record was the wise and necessary precondition for responsible Sixth Amendment adjudication. Only by such a remand can the district court and any subsequent appellate court obtain the facts necessary for a fully informed specification and determination of the constitutional issues raised by Landrigan's ineffective-assistance claim.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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